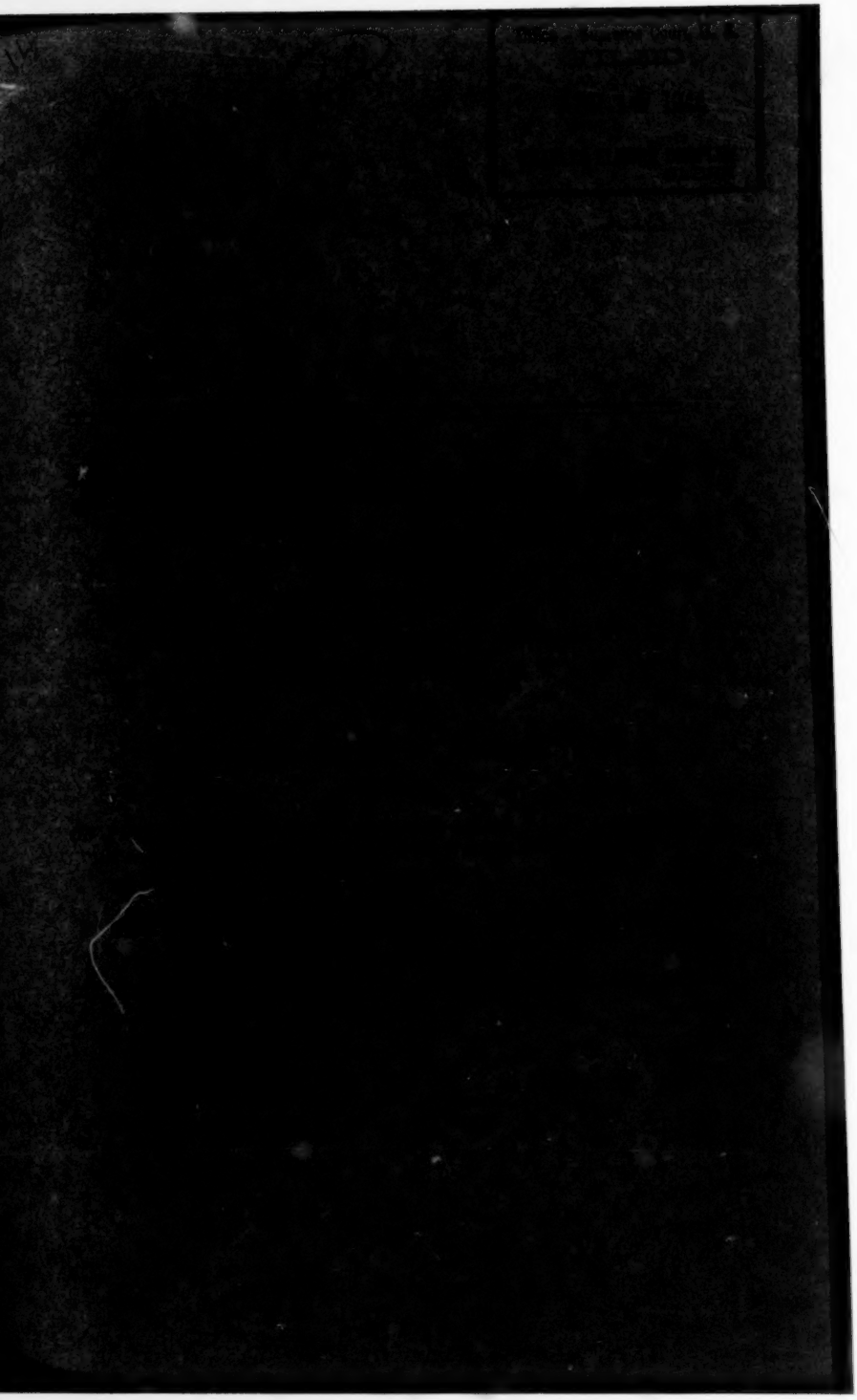

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	9
Conclusion	15

CITATIONS

Cases:

Federal Trade Commission v. *Pacific States Paper Trade Assn.*, 273 U. S. 52 — 13

Frankfort Distilleries, Inc. v. *United States* (C. C. A. 10), decided February 28, 1944 — 14

Higgins v. *Carr Bros. Co.*, 317 U. S. 572 — 14

Local 167 v. *United States*, 291 U. S. 293 — 13

Parker v. *Brown*, 317 U. S. 341 — 9, 10

Swift & Co. v. *United States*, 196 U. S. 375 — 13

United States v. *General Motors Corp.*, 121 F. (2d) 376, certiorari denied, 314 U. S. 618 — 13

Walling v. *Jacksonville Paper Co.*, 317 U. S. 564 — 14

Wholesale Tobacco Dealers v. *National Candy & Tobacco Co.*, 11 Cal. (2d) 634 — 12

Statutes:

Act of July 2, 1890, Section 1, 26 Stat. 209, 15 U. S. C. sec. 1 — 2

California Unfair Practices Act, as amended — 3, 10, 11, 12

582611—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 787

CALIFORNIA RETAIL GROCERS & MERCHANTS ASSOCIATION, LTD.; ET AL.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not render an opinion. The opinion of the circuit court of appeals (R. 1098–1112) is reported in 139 F. (2d) 978.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 30, 1943, and the petition for rehearing was denied February 16, 1944 (R. 1112–3). The petition for a writ of certiorari was filed on March 13, 1944.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925, and as modified by Rule 11 of the Criminal Appeals Rules.

QUESTIONS PRESENTED

1. Whether the district court erred in rejecting evidence offered to show that petitioners' purpose in conspiring to fix prices was to secure compliance with the California Unfair Practices Act by retail and wholsale grocers.

2. Whether the evidence warranted the district court in finding that petitioners' price-fixing conspiracy restrained interstate commerce.

STATUTE INVOLVED

Section 1 of the Sherman Act of July 2, 1890, 26 Stat. 209 (15 U. S. C. 1), provides, in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

STATEMENT

An indictment returned in March 1942 charged petitioners and others with having been engaged since June 1935 in a conspiracy to fix, maintain, and stabilize the retail prices of grocery products shipped into the northern part of California from other States, in violation of Section 1 of the Sherman Act.[1] The indictment also charged that,

[1] The area of price fixing covered by the indictment is that part of the State of California bounded by Bakersfield and San Luis Obispo on the south and by the Oregon State boundary line on the north (R. 3, 12).

as a part of the conspiracy, the wholesale prices of such goods were fixed. (R. 2–20.) Petitioners[2] were tried by the district court after jury trial had been waived and were found guilty, and their convictions were affirmed by the circuit court of appeals (R. 43, 862–3, 1112).

There is little dispute as to the facts established by the Government's evidence, which was in large part documentary. The conspiracy was formed by California Retail Grocers & Merchants Association, Ltd., which will be referred to as the Association, a membership corporation composed of retail grocers doing business in California. The other principal participants in the conspiracy were various allied associations composed of retailers, or of retailers and wholesalers, engaged in selling grocery products in the northern part of California. Ostensibly the undertaking was one to enforce and police the California Unfair Practices Act (R. 46).[3] What petitioners actually undertook to do and did was to fix and stabilize retail and wholesale prices on grocery products throughout the entire northern part of the State of California, as shown by the follow-

[2] Petitioners are thirteen associations of retail grocers in northern counties of California and nine of their officers. Of the defendants other than petitioners, the three chain store corporations and their officers and two other defendants pleaded nolo contendere (see R. 38), and the indictment was dismissed prior to trial as to two other defendants.

[3] This statute is set forth in the Appendix to the petition.

ing summary of certain facts shown by the evidence.

Petitioners undertook to bring about the adoption of a specified percentage mark-up by all retail grocers. The mark-up originally agreed upon, to become effective September 6, 1935, was 6% (R. 229–31). Since retailers making quantity purchases could sometimes buy directly from manufacturers at the jobber or wholesale price and this "practice has the tendency to break down retail price structures," it was agreed that, effective January 1, 1936, there should be an additional 2% mark-up on all such direct purchases (R. 245–6). In the spring of 1938, the general retail mark-up was raised to 8% (R. 280–1, 297–8); in November 1939, it was raised to 10% (R. 65, 314, 568–9).

Petitioners likewise procured the adoption of a specified percentage mark-up on wholesale sales of grocery products. The Food Trades Institute, Inc. (hereafter referred to as the Institute), a department or branch of the Association (R. 276), notified all northern California wholesalers that in order to maintain the excellent results achieved in the retail field, it was necessary to have a "definite understanding" with them that their minimum mark-up would be 3% (R. 251–3). This agreement became effective April 10, 1937 (R. 253). The detailed nature of the agreement is shown by the following excerpt from a bulletin sent to wholesalers by the Institute, to become effective June 1, 1937 (R. 261):

> Drop shipments[4] to be invoiced at not less than 1% over net cost covering articles enumerated on the attached list and all other articles that may be added to same from time to time.[5]

This program applied to all wholesalers, including retail-owned organizations and chain stores distributing through their own warehouses (R. 262). Every wholesaler was required to have "the same price to everyone" (R. 252). The Institute advised wholesalers that any violation reported to it would be investigated and that it would assist the county district attorney in preparing suits against violators under the California Unfair Practices Act (R. 259).

In the case of importing wholesalers, the mark-up was fixed at 10% and, to put all purchasing retailers "on an equal basis," the mark-up was to be based on replacement cost, not the actual cost of stocks on hand (R. 253–4). The Institute informed these wholesalers that "you must submit a list of your selling prices, particularly on the staple lines," to the Institute and notify it at once of any price changes, and that "No sale below your regular price list is permitted" (R. 255).

At a meeting in December 1935 attended by representative food manufacturers, brokers, and

---

[4] Drop shipments are shipments direct from manufacturer to retailer.

[5] There followed a list of a number of firms and of commodities (R. 261).

wholesalers, as well as over 60 of the larger San Francisco retailers, it was agreed that the retail price of fresh butter "could not be stabilized unless there was some stabilization from the jobbing point of view"; that the Institute be set up as the butter "coordinating agency"; that every butter jobber use as his "basic price" the price on the San Francisco Butter Exchange, file with the Institute his overage above this price, make no sales at less than "his published overage over the Exchange price," and file with the Institute 24-hour advance notice of any change in overage, which the Institute would immediately report to every jobber (R. 239, 275–6).

As early as December 1935, petitioners went beyond merely agreeing on fixed mark-ups on retail prices. At that time, many grocery items had "advanced materially in price." It was pointed out that a retailer who sold on the basis of the cost of his stocks on hand was "simply forcing Everyone Else to take a loss for no reason whatsoever." To prevent this, "minimum retail prices" on numerous staple items "were agreed to, effective January 1st, 1936". (R. 246–7.)

At this same meeting in December 1935, in order to end the "bad practice" of "price cutting" on butter, a rule "establishing minimum retail prices" was unanimously adopted. The rule required each retailer to add to the basic price for the preceding day set by the Butter Ex-

change a mark-up stated in terms of a specified number of cents. (R. 247.)

As to items not covered by agreement on specific prices, care was taken to prevent variables in the cost on which the mark-up was based. It was agreed that the mark-up should be based on invoice price without taking into account any cash discount or advertising allowance received by the retailer. (R. 243–4, 271–3.) Furthermore, petitioners' "Price Stabilizing Program" undertook to eliminate price competition not only between retail grocers but also between them and others who handled goods of the same kind.[6]

In order to finance enforcement of the program, all wholesale distributors of evaporated milk in northern California were asked to add 2¢ per case to their selling price and remit to the Association monthly the amount of this mark-up (R. 68–9, 425). The plan was presented to both wholesalers and "the milk companies selling direct to the retail

[6] An Institute bulletin issued when the agreed mark-up by retail grocers was 6%, reads in part (R. 271, 273):

> On taxable items the mark-up must be 9% as all grocers are in the habit of absorbing the Sales Tax. This will stabilize prices between the druggists and grocers as the former charge the Sales Tax and the grocers do not.
>
> * * * * *
>
> This program has been sanctioned unanimously by the larger grocery operators in San Francisco and assurance has been received from the large drugstore operators in San Francisco that the above will be maintained on grocery items sold by them.

582611—44——2

trade," and "definite commitment" to adopt the plan was received by the Institute from approximately 95% of the wholesalers and direct sellers (R. 424–5). The Association warned a wholesaler that "it may be necessary for us to inform the trade of those wholesalers who refuse to cooperate in this fair and equitable plan" (R. 425).

A very substantial part of the products handled by wholesalers in northern California came from without the State. In northern California, the defendant Safeway Stores, Inc., operated about 600 retail stores, made annual purchases of "dry" groceries of about $28,000,000, distributed goods through its six or seven central warehouses by weekly or semi-weekly deliveries to its stores, and received deliveries from out-of-State points of such items as canned corn, canned peas, canned string beans, and Campbell Soup Co. products at an average rate of a carload a week. (R. 404, 406.) Ninety percent of purchases aggregating over $2,000,000 made by a San Francisco wholesaler were obtained by direct shipment from manufacturers outside the State (R. 378–382, 384–5).

Various methods of distribution which closely linked wholesaler and retailer were shown. A group of retailers who are tied into some special working arrangement with a specific wholesaler and obtain supplies from him on a preferential basis are known as a "voluntary chain" (R. 362, 363). A "cooperative" jobber is one organized as

a membership corporation, with membership confined to retailers who pay a monthly service fee and receive a return of the profits of wholesale operations (R. 363, 367). A cooperative of this kind operating in northern California had about 700 members and purchased many of its most important items from manufacturers outside California (R. 363, 371–2). Some of the items which it handled, such as sugar, turned over almost daily (R. 372).

ARGUMENT

1. Petitioners contend that the court below erred in holding that the district court had properly rejected certain evidence offered to show that petitioners' objective was to secure observance of the California Unfair Practices Act (which is reproduced in the Appendix to the petition). Petitioners urge (Pet. 13, 14–15) that this holding is in conflict with *Parker* v. *Brown*, 317 U. S. 341.

This Court held in *Parker* v. *Brown* that the Sherman Act does not apply to "state action or official action directed by a state" and that a State, when carrying out State legislation, enters into no "conspiracy" in restraint of trade within the meaning of the Sherman Act. But the Court also declared that a State was powerless to sanction restraints of trade by private agreement which the Sherman Act prohibits. When Congress in the exercise of a granted power occupies

a legislative "field," its enactment prevails over inconsistent State legislation and, in consequence, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful" (317 U. S. 341, 350, 351).

Since petitioners' activities would not be State action or action required by State authority even if these activities had been directed at securing adherence to the provisions of the California Unfair Practices Act, proof that this was petitioners' purpose would not bring the case within the ruling in *Parker* v. *Brown*. Exclusion of evidence of such purpose was therefore not in conflict with that decision. Petitioners attempt to bring themselves within the decision by implying (Pet. 14–15) that the California legislature intended to leave enforcement of this statute to "private initiative," but petitioners have been unable to show that this was the legislative intent. There is plainly no basis for such an interpretation of the statute. It contains penal sanctions (sec. 11), enforceable by State officials.[7] The fact that any person, including a "trade association," is authorized to bring an action to restrain violations (sec. 10) obviously does not

[7] In addition, it is made the duty of the Attorney General of California (sec. 8) to institute quo warranto proceedings against a corporation upon third violation of the statute.

convert these potential plaintiffs into State enforcement officers.

Petitioners also contend (Pet. 15–16) that, where the objective of those engaged in price fixing is to bring about adherence to State legislation, there is, or should be, an exception to the settled rule that price fixing is illegal *per se* under the Sherman Act. If this interpretation of the Act were adopted, presumably the objectives of petitioners in fixing prices would be relevant and evidence offered as to their objectives should have been received. But the novel construction of the federal statute proposed by petitioners must, we submit, be rejected. Petitioners point to no decision supporting it. To accept it would mean that the policy declared by Congress as to interstate commerce would not have a uniform application but would vary in accordance with the varying rules applied by the different States to their local trade and commerce.

The evidence offered by petitioners was also properly rejected because, as the court below held, it did not show or tend to show that petitioners did no more than promote agreements not to violate the California Unfair Practices Act. That statute does not authorize price fixing nor does it prohibit the sale of goods below "cost" (sec. 3) except where the sale is for the purpose of injuring or destroying competitors.

Wholesale Tobacco Dealers v. *National Candy & Tobacco Co.*, 11 Cal. (2d) 634, 655, 658–660.[8] The proof in the instant case indubitably established that petitioners engaged in fixing prices and established a fixed mark-up applicable to every sale irrespective of any purpose to injure or destroy competitors.[9] Accordingly, even if the question whether petitioners had acted in conformity with the Unfair Practices Act were relevant to the issues in this case, the evidence that the agreed mark-ups represented or were believed to represent the retailer's or wholesaler's cost does not show or tend to show that agreement upon such mark-ups was tantamount to agreement not to violate the State law.

2. Petitioners contend that the court below erred in holding that the evidence was sufficient

---

[8] Petitioners, by referring (Pet. 20, 22) to a 1937 amendment to Section 3 of the California Act, prohibiting, within certain limitations, "loss leader" sales, apparently intend to suggest that the *Wholesale Tobacco Dealers* case is not an authoritative interpretation of the law in effect since 1937. While that case involved the law as enacted in 1935, the court (11 Cal. (2d) at p. 659) referred to the 1937 amendment of Section 3 as reinforcing its construction of that Section.

[9] Petitioners refer to numerous record citations in support of their statement (Pet. 21) that the court below was mistaken in stating that petitioners did not, prior to March 1941, inform the trade that sales below cost do not violate the Unfair Practices Act unless made with intent to injure competitors. We find in these citations no written communication to the trade of this nature apart from quotation of or remittance of the text of the law.

to justify the trial court in finding that their conspiracy was in restraint of interstate commerce.[10] We submit that the evidence in this case, which shows that throughout most of California the wholesale and retail trade in groceries was blanketed by price-fixing agreements, fully warrants the finding that commerce in groceries shipped into the State from without was restrained. The trade of shippers of such products was clearly restrained when, by reason of the conspiracy, these shippers were compelled to sell in a market in which price competition among the purchasers of their goods was wholly or largely suppressed. Similar facts have been held to support a finding of restraint of interstate commerce. *Local 167* v. *United States,* 291 U. S. 293, 297; *Swift & Co.* v. *United States,* 196 U. S. 375, 398; *United States* v. *General Motors Corp.,* 121 F. (2d) 376, 398, 401–402, certiorari denied, 314 U. S. 618; cf. *Federal Trade Commission* v. *Pacific States Paper Trade Assn.,* 273 U. S. 52. In the *Local 167* case, this Court said (291 U. S. at p. 297):

> The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate move-

[10] Petitioner's references (Pet. 9, 17) to the Government's position in the court below with respect to interstate commerce were derived from statements torn from context and hence convey an inaccurate impression. Cf. R. 1111.

> ment ends may operate directly to restrain and monopolize interstate commerce.
> * * *

Contrary to petitioners' assertions (Pet. 16, 18), the decision that there was sufficient evidence to warrant a finding of interstate commerce is not in conflict with *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, or the companion case of *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572. The question presented in those cases was whether certain employees were engaged "in [interstate] commerce," not whether interstate commerce was restrained by acts which themselves might not be interstate. Furthermore, under the facts previously set forth as to the interstate purchases and distribution systems of chain stores and cooperative jobbers (*supra*, pp. 8–9), at least a part of the sales subjected to price fixing must be deemed to have been in interstate commerce [11] within the principles set forth in the *Jacksonville Paper* case. These facts alone warrant the district court's determination that interstate commerce was restrained.

---

[11] As the circuit court of appeals held, "the conspiracy aimed to fix all minimum retail prices whether of an out-of-state wholesaler making an interstate sale or a retailer selling goods he had imported from out-of-the-state or intrastate sales by retailers of goods produced within the state. The purpose of the conspiracy was to 'stabilize' the entire trade in California in all sales, whether interstate or intrastate" (R. 1111).

Petitioners in their supplemental brief contend that the decision below is in conflict with *Frankfort Distilleries, Inc.* v. *United States,* decided by the Circuit Court of Appeals for the Tenth Circuit on February 28, 1944. The court in that case held that the indictment charged a conspiracy intended to affect only intrastate activities and that it did not allege that the defendants' restraints of these activities directly and substantially burdened interstate commerce. There is, we submit, no conflict between that decision and the holding in the instant case, which turns upon the question whether there was proof to support the trial court's factual determination that the restraints imposed by petitioners were not confined, in their purpose and in their effect, to intrastate commerce.

The ruling of the circuit court of appeals respecting interstate commerce concededly does not rest upon any new or novel principle of law. Where the question, as here, turns upon the sufficiency of the evidence and two lower courts have held the evidence sufficient, there is no need for further review.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. It is therefore respectfully

submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

CHARLES H. WESTON,
Special Assistant to the Attorney General.

WALTER J. CUMMINGS, Jr.,
Attorney.

APRIL 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944